No. 11,185

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM COXON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal by William Coxon, as plaintiff-appellant, from a final judgment of the United States District Court of the District of Arizona, sitting at Phoenix, entered on the 10th day of September, 1945, in favor of defendant following an order granting defendant's motion to dismiss entered July 25th, 1945. (R. 28). The judgment sustained defendant's motion to dismiss plaintiff's complaint, and also dismissed the action. (R. 29). The district judge wrote no opinion.

The action was begun in the Superior Court of the State of Arizona in and for the County of Maricopa by complaint filed in that court on the 26th day of January, 1945, No. 54057, wherein William Coxon was plaintiff and Southern Pacific Company, a corporation, was defendant.* (R. 2). Plaintiff sought actual and punitive damages against Southern Pacific Company for wrongful discharge.

The action was removed by defendant from the state court to the district court and, after having been duly submitted, was disposed of by order of that court sustaining defendant's motion to dismiss, and by judgment dismissing the action. (R. 28, 29).

STATEMENT OF JURISDICTION

Jurisdiction of District Court

The complaint filed in the state court on January 26th, 1945, alleges that plaintiff is a resident of the State of Arizona, and that defendant is incorporated under the laws of the State of Kentucky, and is authorized to do business and is doing business as a common carrier by railroad in the State of Arizona. (R. 2). Plaintiff sued the defendant for actual damages in the amount of $50,000, and punitive damages in the amount of $50,000. (R. 12). The complaint and summons were served on defendant on January 26th, 1945 (R. 14) and defendant was required to answer within twenty days thereafter.

On February 15th, 1945, which was within defend-

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*The parties will be referred to in this court as they were in the court below.

ant's time to answer, a verified petition for removal of the action to the United States District Court was filed by defendant in the state court. (R. 15). The petition discloses diversity of residence and citizenship of the adversary parties and the requisite jurisdictional amount. (R. 16). A bond on removal in the principal sum of $500 was also filed in the state court on February 15th, 1945. (R. 18). The order for removal was dated and entered in the state court on the same day. (R. 21). A transcript of removal proceedings, certified by the clerk of the state court, was lodged in the United States District Court on March 16th, 1945. (R. 22). The verified petition for removal filed in the state court discloses that the action filed there was between plaintiff, who is a resident and citizen of the State of Arizona, and defendant, which is a resident and citizen of the State of Kentucky, and that the action involves more than $3000, exclusive of interest and costs, and consequently was removable from the state court to the United States District Court as authorized and provided by the laws of the United States.

Secs. 28, 29, Judicial Code, as amended, Title 28, Secs. 71, 72, U.S.C.A.

Jurisdiction of this Court

The jurisdiction of this court is invoked under Sec. 128(a) of the Judicial Code, as amended (Title 28, Sec. 225, U.S.C.A.), which provides:

> "(a) Review of Final Decisions. The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal the final decisions—

> First. In the district courts, in all cases save where direct review of the decision may be had in the Supreme Court under section 345 of this title."

Sec. 240-8(c) of the Judicial Code (Title 28, Sec. 230, U.S.C.A.) provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

The notice of appeal was filed by plaintiff on the 22nd day of October, 1945 (R. 31) and the bond for costs on appeal was filed the same day. (R. 33). The final judgment was entered the 10th day of September, 1945, and was entered in the clerk's civil docket on the same day. (R. 27). Consequently the appeal from the final judgment of the district court to this court was timely.

STATEMENT OF THE CASE

The case is stated by the complaint. The issues of law are raised by the motion to dismiss which asserted the complaint failed to state a claim against defendant upon which relief can be granted (R. 23), and by the final judgment sustaining the motion to dismiss and dismissing the action. (R. 29). Consequently, the essential facts well pleaded necessary to state a claim upon which relief can be granted are admitted. These facts necessarily are reflected by the complaint, which states the plaintiff's claim for relief, and are as follows:

Plaintiff entered the employ of defendant about June 5th, 1917, as a yard clerk on the Tucson Division of defendant's railroad, and continued that employment in various clerical positions until May 25th, 1944. (R. 3).

The early part of 1944 plaintiff announced his candidacy for nomination (and election) to the office of Governor of Arizona. On February 9th, 1944, he became ill and obtained a leave of absence from his employment, remaining absent upon that account until March 29th, 1944, whereupon in order to conduct his campaign, plaintiff applied for leave of absence until July 31st, 1944. Defendant granted plaintiff leave of absence for ninety days, beginning February 9th, 1944 and ending May 9th, 1944. On April 26th, 1944, plaintiff requested an extension of his leave of absence for ninety days to conduct his campaign, but on May 13th, 1944, defendant instructed plaintiff that by reason of a rule, regulation or order, adopted by defendant by agreement theretofore entered into by defendant and a labor organization known as the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, plaintiff's request for further leave of absence was denied and he was instructed to report for duty immediately. (R. 3, 4).

Defendant's refusal to grant the further extension of leave of absence was attributed by defendant to refusal of the labor organization to agree to such extension beyond May 9th, 1944, as provided in the agreement entered into between defendant and the labor organization. (R. 4).

Pursuant to the rule, regulation or order, and the agreement heretofore mentioned, plaintiff's employment

with defendant was declared permanently vacant, and on May 25, 1944, defendant advised plaintiff that his employment was declared permanently vacant. (R. 4).

Plaintiff asserts that defendant, its officers and agents, by enforcing or attempting to enforce the rule, regulation, order or agreement, and by the use of that device or method, attempted to prevent plaintiff from engaging in political activities in the respect heretofore stated, and thereby attempted to deprive plaintiff of civil rights guaranteed to him by the Constitution and laws of Arizona. (R. 4, 5).

The agreement entered into by defendant and the labor organization became effective October 1st, 1940, and provides by Rule 39 thereof as follows:

> "Leave of Absence
>
> Rule 39.
>
> (a) Employees may be granted leave of absence, limited except in case of illness or other physical disability, to ninety (90) calendar days in any calendar year without loss of seniority. Retention of seniority during longer leave of absence may be arranged for by agreement between employing officer and local committee. Leave of absence in excess of thirty (30) calendar days must be in writing. An employee returning from leave of absence shall give at least eight (8) hours' advance notice to his immediate superior of his intention to assume duty on his position.
>
> (b) Members of General or Local Committees, representing employees covered by these rules, will be granted leave of absence without unnecessary delay, and without loss of seniority." (R. 5).

Rule 810 of the General Rules and Regulations of defendant provides:

> "Employees must not engage in any other business without permission from proper officer. They must report for duty at the prescribed time and place and devote themselves exclusively to their duties during prescribed hours." (R. 6).

In support of his contention that defendant, by enforcing the aforesaid agreement, and by the use of that device or method, attempted to prevent plaintiff from engaging in political activities so as to deprive plaintiff of civil rights guaranteed to him by law, plaintiff pleaded and invoked Sec. 43-1508, Arizona Code Annotated, 1939, which is as follows:

> "43-1508. Corporation Restraining or Aiding Political Activities of Employee—Penalty.—It shall be unlawful for any corporation, its officers or agents, to make, enforce, or attempt to enforce, any order, rule or regulation, or adopt any other device or method to prevent an employee from engaging in political activities, accepting candidacy for nomination or election to, or the holding of political office, or from holding a position as a member of any political committee; or from soliciting or receiving funds for political purposes; or from acting as chairman or participating in a political convention; or assuming the conduct of any political campaign; or for any corporation, its officers or agents to instigate, encourage, aid or assist, whether by personal service or contributing money or anything of value, any employee in its employ to run for or be elected to any political office; or for any corporation, its officers or agents to pay or con-

tribute anything of value, whether in wages, fees or contributions, to any such employee in its employ while such employee is engaged in the official duties of the office to which such employee is elected; or from casting his ballot or vote as his conscience may command. Any employer may suspend the wages or compensation of an employee elected to office when his duties as such officer interfere with his duties as employee. Any person violating any provision of this section shall be guilty of a misdemeanor, and punished, if a corporation, by a fine of not less than five hundred dollars ($500), nor more than five thousand dollars ($5,000); and if a natural person by a fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5000), or by imprisonment in the county jail not less than six (6) months nor more than (2) years, or by both such fine and imprisonment." (R. 6, 7).

Plaintiff asserts that from the date of his employment on June 5th, 1917, until his discharge on May 25th, 1944, he had accumulated valuable rights as an employee of defendant, known as "seniority rights," which entitled plaintiff to control and exercise valuable preferences of employment, superior to seniority rights of other employees of defendant who held such rights for a lesser period of time. (R. 8). These seniority rights entitled plaintiff to seek and acquire preference as to the character of service to be performed by him, the location of his employment, the amount of salary he was entitled to earn as well as prestige arising from such rights, which were totally lost by plaintiff's unlawful and wrongful discharge, all to his harm and damage. (R. 8, 9).

Plaintiff asserts that at the time of his discharge he had been employed by defendant for approximately 27 years and had then reached the age of 48 years, and that plaintiff would have been permitted, except for his wrongful discharge, to continue in defendant's employ in the capacity in which he was employed at the time of his discharge, and that he is now disqualified and prohibited from seeking similar employment with other railroad companies or corporations, or for comparable compensation and with the same rights and advantages which he had theretofore enjoyed. (R. 9).

Plaintiff asserts, upon information and belief, that defendant and the aforementioned labor organization, devised and conspired with each other to deprive plaintiff of the opportunity and right to seek nomination and election to the office to which he aspired, because defendant and the labor organization did not desire plaintiff's election as Governor of Arizona, but preferred the election of some other person to that office. (R. 9, 10).

Plaintiff, in addition to the general damages heretofore stated, asserts four items of special damages arising out of—

(a) Loss of the benefits to which he was entitled under the Railroad Retirement Act of 1935 (Title 45, Secs. 215 to 228 inclusive, U.S.C.A.) (R. 10);

(b) Life insurance in the amount of $2000, payable to plaintiff's family, the cost of which was deducted from plaintiff's monthly salary (R. 10);

(c) Railroad transportation without cost on railroad lines operated in the United States, Canada and Mexico, available to plaintiff and his family, both before and

after plaintiff's retirement, of the annual value of $300 (R. 11);

(d) Medical and hospital facilities afforded to plaintiff by defendant of the annual value of $150, for which defendant deducted each month from plaintiff's salary the sum of $1.75 (R. 12).

As a result of the damages claimed, plaintiff prayed judgment against defendant for actual damages in the sum of $50,000, and for exemplary damages in the sum of $50,000.

STATEMENT OF POINTS RELIED ON IN SUPPORT OF APPEAL

Plaintiff filed a statement of points in the lower court as required by Rule 75(d) of the Rules of Civil Procedure. (R. 33). The statement of points is adopted by plaintiff in this court in aid of this appeal. (R. 41).

QUESTION INVOLVED

The question involved is: Does plaintiff's complaint state a claim upon which relief can be granted against defendant for damages arising out of plaintiff's alleged wrongful discharge by defendant?

HOW QUESTION IS RAISED

The question on this appeal is raised by the final judgment of the District Court entered September 10th, 1945, which granted defendant's motion to dismiss plain-

tiff's complaint, and which dismissed the action after the cause had been duly submitted (R. 29, 30), and plaintiff's appeal from that judgment. (R. 31).

SPECIFICATION OF ERRORS

I.

The judgment of the District Court dismissing this action, following the order of the District Court granting defendant's motion to dismiss the complaint, is contrary to law and is erroneous, for the reason that plaintiff's complaint states a claim against defendant upon which relief can be granted.

II.

The judgment of the District Court sustaining defendant's motion to dismiss, and dismissing the action, is contrary to law and erroneous for the reason that defendant's motion to dismiss the complaint is insufficient in law to constitute a defense to the complaint, and the claim for relief stated by it, because the complaint states a claim against defendant upon which relief can be granted.

III.

The judgment of the District Court, sustaining defendant's motion to dismiss, and dismissing the action, is contrary to law and is erroneous, for the reason that plaintiff's complaint discloses that the discharge of plaintiff by defendant for the reasons set forth in the complaint constituted a breach of plaintiff's contract for which defendant is liable to plaintiff in damages.

IV.

The judgment of the District Court sustaining defendant's motion to dismiss, and dismissing the action, is contrary to law and erroneous for the reason that defendant's motion to dismiss plaintiff's complaint is insufficient in law to constitute a defense to the complaint and action, and for the reason that the complaint states a claim against defendant upon which relief can be granted in this:

The complaint discloses, as one of the actionable wrongs pleaded, that plaintiff was discharged by defendant upon the asserted violation by plaintiff of defendant's rules and regulations of employment which are in conflict with and in violation of Sec. 43-1508, Arizona Code Annotated, 1939, which secured to plaintiff the right, privilege and prerogative to become a candidate for public office in the State of Arizona unrestricted by any rule or regulation adopted and enforced by defendant in respect to plaintiff's contract of employment with defendant, and further because said law was a valid and subsisting law of the State of Arizona at the time plaintiff was discharged by defendant, and did not offend either the Constitution of the United States or the Constitution of the State of Arizona.

SUMMARY OF THE ARGUMENT

Appellant's argument will be divided into sub-heads which necessarily will cover the four Specification of Errors set forth, *supra,* and will point out the reasons why the complaint states a claim upon which relief can

be granted, particularly when tested by the Federal Rules of Civil Procedure. The following points summarize the reasons why the case should be reversed:

(a) The complaint states a claim upon which relief can be granted for wrongful discharge and consequently the judgment of the District Court sustaining the defendant's motion to dismiss, and dismissing the complaint and the action, is clearly erroneous. (page 14 *infra*)

(b) The seniority rights which plaintiff acquired were valuable property rights and were entitled to the same protection as other property rights, and the wrongful destruction of those rights by defendant is actionable. (page 18 *infra*)

(c) At the time plaintiff was discharged, he was conducting his campaign for the office of Governor of the State of Arizona, and he requested defendant to grant to him a leave of absence in order to conduct and continue his campaign for that office, which defendant refused in violation of Sec. 43-1508, Arizona Code Annotated, 1939, which makes it unlawful for any corporation to make, enforce or attempt to enforce any rule or regulation prohibiting an employee from engaging in political activities or accepting a candidacy for nomination or election to, or the holding of a political office, and prescribing punishment for violation of that provision of the law. The violation of this penal law subjected defendant to damages. (page 23 *infra*)

(d) Section 43-1508, Arizona Code Annotated, 1939, does not impose a limitation and duty upon defendant for the benefit of the public only, but also imposes a limitation and duty upon the defendant for the benefit of the plaintiff who may maintain this action against the defendant for damages

arising from a violation of the statute. (page 32 *infra*)

(e) The complaint is sufficient to state a claim against defendant upon which relief can be granted for tortious conduct so as to justify the claim and award of exemplary damages in addition to actual damages. (page 37 *infra*)

(f) Tested by the rules governing pleadings, the complaint states a claim upon which relief can be granted. (page 40 *infra*)

ARGUMENT

(a) The complaint states a claim upon which relief can be granted for wrongful discharge and consequently the judgment of the District Court sustaining defendant's motion to dismiss, and dismissing the complaint and the action, is clearly erroneous.

(Specification of Errors I, II, p. 11, *supra.*)

Plaintiff entered the employment of defendant on June 5th, 1917 (R. 3) and continued in that employment until May 25th, 1944, when it was declared permanently vacant. (R. 4). Consequently, plaintiff's employment with defendant extended over a period of approximately 27 years (R. 9), during which time plaintiff acquired valuable seniority rights (R. 8), and, in addition, plaintiff, until discharged by defendant, was entitled to benefits of the Railroad Retirement Act; group life insurance; transportation and medical and hospital benefits. (R. 10).

On February 9, 1944, plaintiff became ill and obtained a leave of absence from his duties with defendant and remained absent because of that illness until March

29th, 1944, whereupon plaintiff, in order to conduct his campaign for the office of Governor of Arizona, made application for leave of absence until July 31st, 1944. (R. 3). Defendant granted plaintiff a ninety day leave of absence, *beginning February 9th, 1944,* and ending May 9th, 1944, instead of ending July 31st, 1944, as plaintiff requested.

On April 26th, 1944, plaintiff requested an extension of his leave of absence for ninety days in order to conduct his campaign, but on May 13th, 1944, defendant instructed plaintiff that by reason of a rule, regulation or order adopted by defendant by agreement entered into between defendant and the Brotherhood of Railroad and Steamship Clerks, Freight Handlers, Express and Station Employees, plaintiff's request for further leave of absence was denied and he was instructed to report for duty immediately. (R. 4). Defendant's refusal to grant the extension of leave of absence was attributed by defendant to the refusal of the brotherhood to agree to an extension of plaintiff's leave of absence beyond May 9th, 1944. (R. 4). Accordingly plaintiff's employment with defendant was declared permanently vacant on May 25th, 1944. (R. 4).

Although plaintiff was not a member of the brotherhood, nevertheless defendant invoked the agreement entered into between the defendant and the brotherhood as defendant's justification for the discharge of plaintiff. (R. 5).

Yazoo & M. V. R.R. Co. v. Webb, 5 Cir., 64 Fed. 2d 902;

Yazoo & M. V. R.R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669;

McGlohn v. Gulf & S. F. R. Co. (Miss.), 174 So. 250;

Rentschler v. Missouri Pacific R.R. Co., 126 Neb. 493, 253 N.W. 694, 95 A.L.R. 1, and note beginning at page 41.

Compare:

Steele v. Louisville & N. R. Co. (decided Dec. 18, 1944), 323 U.S. 192, 204, 65 Supreme Court Reporter 228 (Adv. Sheets January 1, 1945, Vol. 65—No. 4, p. 226).

Measured by Rule 39 of the agreement which defendant invoked, and the refusal of the brotherhood to agree to an extension of plaintiff's leave of absence, the defendant clearly breached plaintiff's contract of employment as appears from the following allegations of the complaint.

On February 9th, 1944, plaintiff obtained a leave of absence *on account of illness.* He remained absent on that account until March 29th, 1944. (R. 3). At that time he made application to defendant for leave of absence until July 31st, 1944. (R. 3). Defendant granted plaintiff a ninety day leave of absence, but started that leave of absence *from February 9th, 1944,* which was the date plaintiff obtained leave of absence on account of illness. Under Rule 39 of the agreement entered into by defendant and the brotherhood it is provided:

> (a) Employees may be granted leave of absence *limited except in case of illness* or other physical disability, to ninety (90) calendar days in any calendar year without loss of seniority. (R. 5). (Emphasis supplied.)

Therefore, measured by the agreement which defendant invoked, plaintiff was entitled, in all events, to leave of absence without limitation of time because of illness. Plaintiff actually obtained a leave of absence on that account on February 9th, 1944, until March 29th, 1944 (R. 3) but in granting plaintiff's additional request for leave of absence, in order to conduct his campaign, defendant granted plaintiff the leave of absence *but dated it from February 9th, 1944.* When plaintiff on April 6th, 1944, requested an extension of leave of absence in order to conduct his campaign for governor, defendant, on May 13th, 1944, instructed plaintiff to report for duty immediately. Failing to do so, plaintiff's employment was declared permanently vacant on May 25th, 1944. (R. 4).

Had defendant, as it was required to do under Rule 39, started plaintiff's requested leave of absence on March 29th, 1944—the day plaintiff's sick leave ended—instead of February 9th, 1944—the day plaintiff's sick leave began—then the ninety days' leave of absence which defendant first granted to plaintiff would have run from March 29th, 1944, until June 29th, 1944. Therefore, when defendant, on May 25th, 1944, declared plaintiff's employment permanently vacant, defendant prematurely discharged plaintiff. Defendant reaffirmed the discharge on September 28th, 1944, which, of course, related back to the wrongful discharge on May 25th, 1944.

(b) The seniority rights which plaintiff acquired were valuable property rights and were entitled to the same protection as other property rights, and the wrongful destruction of those rights by defendant is actionable.

(Specification of Errors I, II and III, p. 11, *supra.*)

Plaintiff alleges that during his employment with defendant from June 5th, 1917, until his discharge, he had acquired valuable seniority rights which were totally destroyed by his wrongful discharge. (R. 8). These seniority rights were recognized by defendant by Rule 39 of the agreement entered into between defendant and the brotherhood. (R. 5).

The Supreme Court of Arizona has held that seniority rights are property rights and are as much entitled to protection in case they are invaded as other physical property rights.

Grand International Brotherhood of Locomotive Engineers v. Mills, 43 Ariz. 379, 31 P.2d 971.

Addressing itself to this question, the Supreme Court of Arizona (31 P.2d 979) said:

> "Let us then consider more carefully the nature of this seniority right, and whether it falls within the definition of property as above set forth. It is only by means of his labor that the average man can earn the wherewithal to support himself and his family, and perchance, if he is fortunate and frugal, make investments which will provide for his old age. Such being the case, it is of vital importance to those who work for salary or wages, and they constitute a large and constantly increasing part of our citizens, that their opportunity to work be as constant, certain, and lucrative as possible. Any-

thing which tends to promote this increases the earning power of the worker, while anything which tends to diminish it is as great an attack upon his means of livelihood as would be the actual destruction of the physical property through which the wealthier and more fortunate individual obtains his income. A study of the reason for, and the history of, the seniority rule which, although best known among railroad men, is growing more and more in favor among the workers in every class, makes this clear. So long as the contract of employment between a corporation and its hundred and thousands of employees provides for seniority, it is in effect unemployment insurance which the worker has purchased by his years of faithful service. Essentially it is as much a part of his wages as though he received an increase therein and used the increase to buy such insurance therewith. Ten years of service gives him a far greater certainty of retaining his employment than is obtained by one year of service, and in times of fluctuating employment particularly this is of great money value. The very fact that, as the record reveals, the matter was fought so bitterly within the ranks of the brotherhoods themselves, shows that it is not a mere imaginary or sentimental interest which plaintiffs are seeking to protect, but something which may mean the difference between poverty and a competence, between public aid and a self-respecting and independent home. We believe that a seniority right is, under the true principles of equity, as much entitled to protection in case it is invaded as any physical property right which is known.''

The courts are in agreement that seniority rights are valuable property rights and are accorded that full measure of protection which is accorded to other property rights.

Brand v. Pennsylvania Railroad Co. (D.C.P.A.), 22 Fed. Supp. 569;

Carver v. Brien, 315 Ill. App. 643, 43 N.E.2d 597;

Donovan, et al. v. Travers, 285 Mass. 167, 188 N.E. 705;

Samuelson v. Brotherhood of Railroad Trainmen (Wyo.), 151 Pac.2d 347.

Moreover, that the right to work and to earn a livelihood is protected by the 14th Amendment to the Constitution of the United States is firmly established by the Supreme Court of the United States.

Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131.

In that case legislation enacted under the initiative provision of the Constitution of Arizona sought, in instances where five or more workers were employed, to limit employment to not less than eighty per cent qualified electors or native-born citizens, thereby excluding in such cases the employment of aliens. The law was held unconstitutional by the Supreme Court, and in the course of the opinion the Supreme Court said (239 U.S. 38, 41):

> "* * * The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection (safeguarding of rights of property)

in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others."

* * * *

"* * * It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

See, also:

Nord v. Griffin, Cir. 7, 86 Fed.2d 481; cert. den., 300 U.S. 673, 57 Sup. Ct. 612, 81 L.Ed. ....., a case which involved a controversy over seniority rights.

Plaintiff alleges that at the time of his discharge he had reached the age of 48 years, but that notwithstanding his age, he would have been permitted, except for his wrongful discharge, to continue in the capacity he was employed at the time of his discharge. (R. 9).

Thus plaintiff's employment was more than an employment subject to termination at the will of defendant. In fact, Rule 39 provides that plaintiff's seniority rights could have been retained during longer periods of absences when arranged for by agreement of the employing officer and the local committee of the brotherhood. (R. 5).

The complaint construed in its entirety discloses that the employment here was surrounded with rights and privileges which did not permit the termination of the employment either at the will of the defendant or by direction given by the brotherhood to the defendant.

> "Where no definite term of employment is expressed, there is no inflexible rule governing the duration of the relationship. In such cases, the duration of the employment must be determined by circumstances in each particular case. It is dependent upon the understanding and intent of the parties, to be ascertained from their written or oral negotiations, the usages of business, the situation and object of the parties, the nature of the employment, and all the circumstances surrounding the transaction. Regardless, therefore, of the absence of any express stipulation regarding the term of employment, a dispute as to the duration of a contract of employment is to be settled with reference to the terms of the contract, the nature of the services which were agreed to be performed, and the attending circumstances which evidence the intention of the parties, and this is true where the contract is in writing, as well as where it is oral; in either case, the court takes into consideration the situation of the parties, and the objects they had in view. In case the contract has been made with reference to a general custom or business usage which enters into and becomes a part of the agreement, the contract is not, of course, indefinite as to its duration if such custom or usage fixes the term of the employment."
>
> 35 *Am. Jur.* (Master and Servant), Sec. 19, p. 457.

See:

Putnam v. Producers Livestock Marketing Assoc., 256 Ky. 196, 75 S.W.2d 1075, 100 A.L.R. 828, note pages 834, 841.

(c) At the time plaintiff was discharged, he was conducting his campaign for the office of governor of the State of Arizona, and he requested defendant to grant to him a leave of absence in order to conduct and continue his campaign for that office, which defendant refused in violation of Sec. 43-1508, Arizona Code Annotated, 1939, which makes it unlawful for any corporation to make, enforce or attempt to enforce any rule or regulation prohibiting an employee from engaging in political activities or accepting a candidacy for nomination or election to, or the holding of a political office, and prescribing punishment for violation of that provision of the law. The violation of this penal law subjected defendant to damages.

(Specification of Errors IV, p. 12, *supra.*)

Section 43-1508, Arizona Code Annotated, 1939, provides as follows:

"43-1508. Corporation Restraining or Aiding Political Activities of Employees—Penalty.—It shall be unlawful for any corporation, its officers or agents, to make, enforce, or attempt to enforce, any order, rule or regulation, or adopt any other device or method to prevent an employee from engaging in political activities, accepting candidacy for nomination or election to, or the holding of political office, or from holding a position as a member of any political committee; or from soliciting or receiving funds for political purposes; or from acting as chairman or participating in a political convention; or assuming the conduct of any political

campaign; or for any corporation, its officers or agents to instigate, encourage, aid or assist, whether by personal service or contributing money or anything of value, any employee in its employ to run for or be elected to any political office; or for any corporation, its officers or agents to pay or contribute anything of value, whether in wages, fees or contributions, to any such employee in its employ while such employee is engaged in the official duties of the office to which such employee is elected; or from casting his ballot or vote as his conscience may command. Any employer may suspend the wages or compensation of an employee elected to office when his duties as such officer interfere with his duties as employee. Any person violating any provision of this section shall be guilty of a misdemeanor, and punished, if a corporation, by a fine of not less than five hundred dollars ($500), nor more than five thousand dollars ($5,000); and if a natural person by a fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5,000), or by imprisonment in the county jail not less than six (6) months nor more than two (2) years, or by both such fine and imprisonment.''

Defendant's conduct in discharging plaintiff was in direct violation of the foregoing law. The law was enacted by the Legislature of Arizona in 1923 as Chapter 10 of the laws of that legislative session, as appears from the annotation at the end of Section 43-1508, *supra*. Rule 39 of the agreement entered into between defendant and the brotherhood became effective October 1st, 1940, (R. 5). Thus the law antedates the rule by approxi-

mately 17 years. It prohibits all corporations from interfering with the political activities and ambitions of its employees. It is a valid exercise of the police power of the state and offends no constitutional provision of the State of Arizona or of the United States. The law operates equally upon all corporations, domestic and foreign.

The validity of the enactment in its application to defendant as a corporation is sustained by analogous decisions of the Supreme Court of the United States.

Prudential Insurance Co. v. Cheek, 259 U.S. 530, 42 S.Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27, 39;

Chicago, R. I. & P. Co. v. Perry, 259 U.S. 548, 42 S.Ct. 524, 66 L.Ed. 1056.

In *Prudential Insurance Co. v. Cheek, supra,* the Supreme Court had occasion to construe a law of Missouri which required corporations only to issue to their employees a service letter setting forth the nature and character of services rendered by the employee and the duration thereof, and truly stating for what cause the employee quit the service. Failure to issue the letter constituted a misdemeanor punishable by fine and imprisonment. Cheek sued the Prudential Insurance Company for damages arising out of the violation of the law by the insurance company. The company attacked the constitutionality of the law upon the claim that it deprived corporations of due process and equal protection of the law in violation of the Fourteenth Amendment. The Supreme Court of Missouri sustained the law notwithstanding these constitutional objections and

reversed the judgment of the lower court. 192 S.W. 387. On retrial, the employee was awarded judgment and the insurance company again appealed to the Supreme Court of Missouri which transferred the case to the Court of Appeals for final disposition. 209 S.W. 928. That court affirmed the judgment of the lower court. 223 S.W. 754. On writ of error the Supreme Court of the United States sustained the judgment in favor of the employee, and the judgment of the Missouri court, and said (259 U.S. 536 and 546):

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly, or arbitrarily interfered with, consistently with the due process of law guaranteed by the 14th Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair v. United States,* 208 U.S. 161, 174, 52 L.Ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Coppage v. Kansas,* 236 U.S. 1, 14, 59 L.Ed. 441, 446, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240.
>
> "But the right to conduct business in the form of a corporation, and, as such, to enter into relations of employment with individuals, is not a natural or fundamental right. It is a creature of the law; and a state, in authorizing its own corporations or those of other states to carry on business and employ men within its borders, may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient, in order that the corporation's activities may not operate to

the detriment of the rights of others with whom it may come in contact."

* * * *

"It is not for us to point out the grounds upon which the state legislature acted, or to indicate all the grounds that occur to us as being those upon which they may have acted. We have not attempted to do this; but merely to indicate sufficient grounds upon which they reasonably might have acted, and possibly did act, to show that it is not demonstrated that they acted arbitrarily, and hence that there is no sufficient reason for holding that the statute deprives the corporation of its liberty or property without due process of law.

"The argument under the 'equal protection' clause is unsubstantial. As we are assured by the opinion of the supreme court, the mischiefs to which the statute is directed are peculiarly an outgrowth of existing practices of corporations, and are suspectible of a corrective in their case not so readily applied in the case of individual employers, presumably less systematic in their methods of employment and dismissal. There is no difficulty, therefore, in sustaining the legislature in placing corporations in one class and individuals in another. See *Mallinckrodt Chemical Works v. Missouri,* 238 U.S. 41, 55, 56, 59 L.ed. 1192, 1198, 35 Sup. Ct. Rep. 671. And the act applies to all corporations doing business in the state, whether incorporated under its laws or not."

Compare:

Asbury Hospital v. Cass County, N. D., 66 S.Ct. 61, 65 (decided Nov. 5, 1945).

In *Chicago, R. I. & P. Co. v. Perry, supra,* the Supreme Court of the United States had occasion to construe a statute of Oklahoma which was substantially like the statute of Missouri. The Oklahoma statute was sustained by the Supreme Court as a valid exercise of the police power of the state, notwithstanding the statute applied only to public service corporations. A trial by jury in the lower state court resulted in a judgment awarding damages to the plaintiff-employee arising out of the failure of the railroad company to give to the employee the service letter required by the Oklahoma penal statute. The judgment was affirmed by the Supreme Court of Oklahoma.

Dickinson v. Perry, 70 Okla. 25, 181 Pac. 504.

In disposing of the contention that the Oklahoma statute deprived the railroad company of due process of law and the equal protection of the law, the Supreme Court followed *Prudential Insurance Co. v. Cheek, supra,* and in the course of the opinion, by the last paragraph thereof, said:

> "The contention that the Service Letter Law denies to plaintiff in error the equal protection of the laws is rested upon the fact that it is made to apply to public service corporations (and contractors working for them), to the exclusion of other corporations, individuals, and partnerships said to employ labor under similar circumstances. This is described as arbitrary classification. We are not advised of the precise reasons why the legislature chose to put the policy of this statute into effect as to public service corporations, without going further; nor is it worth while to inquire. It may

> have been that the public had a greater interest in the personnel of the public service corporations, or that the legislature deemed it expedient to begin with them as an experiment—or any one of a number of other reasons. It was peculiarly a matter for the legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that they 'knew what they were about.' Middleton v. Texas Power & Light Co., 249 U.S. 152, 157, 158, 63 L.ed. 527, 531, 39 Sup. Ct. Rep. 227, and cases cited."

The two cases last cited construed and sustained statutes of Missouri and Oklahoma which in principle are not unlike Section 43-1508, Arizona Code Annotated, 1939, *supra.* Each supports a civil action for damages arising out of its violation, although a violation of the statute is punishable by fine and imprisonment.

The privilege of becoming a candidate for public office is unquestionably a higher right than the right to receive a service letter upon the termination of employment. Aspiration to public office is essential to the preservation of a democratic form of government.

Defendant's "Motion to Dismiss Action" under the old practice, and prior to the advent of the Rules of Civil Procedure, would be akin to a special demurrer because it sets forth specifically ten purported grounds why "the complaint fails to state a claim against defendant upon which relief can be granted." (R. 23-25).

Ground (8) is that Section 43-1508, Arizona Code Annotated, violates, in addition to the Fourteenth Amendment to the Constitution of the United States, Article

II, Section 4, Constitution of Arizona, in that it deprives defendant of its liberty and property without due process of law. (R. 24). Section 43-1508, *supra,* does not conflict with the due process clause of the Arizona Constitution in any particular. See:

State v. Dominion Hotel, Inc., 17 Ariz. 267, 151 Pac. 958 (affirmed 249 U.S. 265, 63 L.ed. 597, 39 S.Ct. 273);

Dominion Hotel Inc. v. State, 18 Ariz. 345, 161 Pac. 682;

Haddad et al. v. State, 23 Ariz. 105, 201 Pac. 847;

Stargo Mines Company v. Coffee Adm., 28 Ariz. 527, 238 Pac. 335;

State etc. v. Price et al., 49 Ariz. 19, 63 Pac.(2) 653.

Unlike the statute stricken down in *State v. Menderson,* 57 Ariz. 103, 111 Pac.(2) 622, Section 43-1508, *supra,* is definite and certain and sufficiently explicit to inform defendant what conduct on its part will render it liable. The challenged statute does not violate the due process clause of either the Federal or State Constitutions.

Subdivision (9) of the Motion to Dismiss advances the theory that Section 43-1508, *supra,* conflicts with Article II, Section 13, and Article IV, part 2, Section 19, subsections 7 and 13, of the Arizona Constitution, in that it grants to citizens and classes of citizens, privileges and immunities which, upon the same terms, do not equally belong to defendant thereunder. (R. 24, 25).

Article II, Section 13, *supra,* reads:

"(Equal operation of laws)—No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Article IV, part 2, Section 19, *supra,* relied upon by defendant in its Motion to Dismiss, reads:

"No local or special laws shall be enacted in any of the following cases, that is to say:

* * * *

7. Punishment of crimes and misdemeanors.

* * * *

13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

The statute is not local or special in any sense of the word. It applies to all corporations, and their officers and agents. A corporation, of course, can only act through its officers and agents. The statute operates equally upon all the classes mentioned therein. It is within the power of the legislature to determine the evil, under the state's police powers, and to remedy that evil. (*Dominion Hotel, Inc. v. State,* 249 U.S. 265, 63 L.ed. 597, 39 S.Ct. 273, *supra*).

The Supreme Court of Arizona has many times passed upon the equal protection clauses of the Arizona Constitution. The cases from that court will uphold the challenged statute. See:

Hazas v. State, 25 Ariz. 453, 219 Pac. 229;

Haddad et al. v. State, 23 Ariz. 105, 201 Pac. 847;

Hunt v. Mohave County, 18 Ariz. 480, 162 Pac. 600;

Stargo Mines Co. v. Coffee, Adm., 28 Ariz. 527, 238 Pac. 335;

State v. Hooker, 45 Ariz. 202, 41 Pac.(2) 1091;

State v. Dominion Hotel, Inc., 17 Ariz. 267, 151 Pac. 958;

Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391;

Morris v. State, 40 Ariz. 32, 9 Pac.(2) 404;

Fairfield v. Huntington, 23 Ariz. 528, 205 Pac. 814.

(d) Section 43-1508, Arizona Code Annotated, 1939, does not impose a limitation and duty upon defendant for the benefit of the public only, but also imposes a limitation and duty upon the defendant for the benefit of the plaintiff who may maintain this action against the defendant for damages arising from a violation of the statute.

(Specification of Error IV, p. 12, *supra.*)

Section 43-1508, Arizona Code Annotated 1939, inflicts a penalty of fine and imprisonment for its violation. Under a statute which imposes a duty for the benefit of particular individuals, or classes of individuals, any one within the benefit of the statute who sustains an injury by reason of a breach thereof, has a right of action against the person guilty of the breach, and the right of action is not affected by the fact that the statute also makes the breach of duty a criminal offense.

That question was raised in *Cheek v. Prudential Insurance Co., supra,* on the first appeal of the case to the Supreme Court of Missouri, and was carefully considered by that court. 192 S.W. 387, 389, 390. In disposing of the question, the Supreme Court of Missouri said:

> "The position of counsel for the plaintiff is that where the duty imposed by the statute is merely

for the benefit of the public, and a fine or penalty is imposed for breach thereof, no right of action is given thereby to the individual who has been damaged by its breach; but if the duty imposed is also for the benefit of a class of individuals, a right of action is also given thereby to any one of that class who may be damaged by the breach of that duty; and, the plaintiff having been an employe of the defendant for more than 90 days, and this statute having been enacted for the benefit and protection of all employes of all corporations, it gives him a cause of action against the defendant for the damage he sustained by its breach. The best and clearest rule I have been able to find governing the construction of such statutes is stated in 1 Corpus Juris, p. 957, in the following language:

> 'The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute and according to whether it appears that the duty imposed is merely for the benefit of the public and the fine, or penalty, a means of enforcing its duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals, or classes of individuals. If the case falls within the first class, the public remedy by fine, or penalty, is exclusive, but if the case falls within the second class a private action may be maintained, particularly where the injured party is not entitled, or not exclusively entitled, to the penalty imposed.' "

"Cases from various states are cited in support of this rule. In 1 Corp. Jur. 952, it is said:

> 'It is a general rule that wherever a statute imposes a duty for the benefit of particular indi-

viduals, or classes of individuals, any one within the benefit of the statute who sustains an injury by reason of a breach thereof has a right of action against the person guilty of the breach. The private right of action is not affected by the fact that the statute also makes such breach of duty a criminal offense.' "

"In a note, 9 L.R.A. (N.S.) 338, to the case of Wolf v. Smith, the subject is fully discussed and numerous cases are cited. In the case of Parker v. Barnard, 135 Mass. 116, 46 Am. Rep. 450, it is said:

'When an act is commanded or forbidden under a statutory penalty, and a failure to do the act enjoined, or the doing of the act prohibited, causes an injury, the party offending is liable to the party injured for the injury caused by his default, notwithstanding he may also have incurred the penalty.' "

"The courts of this state have repeatedly spoken in no uncertain tones upon this question. In the case of Drain v. Railway Co., 10 Mo. App. 531; Id., 86 Mo. 574, the court, in substance, said: A failure to perform a duty enjoined by statute or ordinance is negligence as a matter of law, for which a recovery may be had by any person injured by reason thereof. To the same effect are the following cases: Hanlon v. Mo. Pac. Ry. Co., 104 Mo. 381, 16 S.W. 22; Graitiot v. Railway Co., 116 Mo. 450, 21 S.W. 1094, 16 L.R.A. 189; Karle v. Railway Co., 55 Mo. 476; Easley v. Railroad Co., 113 Mo. 236, 20 S.W. 1073; Fortune v. Railway Co., 10 Mo. App. 252; Brannock v. Elmore, 114 Mo. 55, 21 S.W. 451; Hutchinson v. Railway Co., 161 Mo. 246, 61 S.W. 635, 852, 84 Am. St. Rep. 710; Jackson v. Railway

Co., 157 Mo. 621, 58 S.W. 32, 80 Am. St. Rep. 650; Weller v. Railway Co., 164 Mo. 181, 64 S.W. 141, 86 Am. St. Rep. 592; Eckhard v. Transit Co., 190 Mo. 593, 89 S.W. 602; Holland v. Railway Co., 210 Mo. 338, 109 S.W. 19; Reeves v. Railway Co., 251 Mo. 169, 158 S.W. 2; Lyons v. Corder, 253 Mo. 539, 162 S.W. 606. In the case of Union Pacific Ry. Co. v. McDonald, 152 U.S. 262, 14 Sup. Ct. 619, 38 L.Ed. 434, the court said:

'The violation of a duty enjoined by statute imposed for the public benefit entitles one injured thereby to an action for damages.' ''

''To the same effect are: Ohio & M. R. Co. v. McGehee, 47 Ill. App. 348; Noble v. Richmond, 31 Grat. (72 Va.) 271, 31 Am. Rep. 726; Platte & D. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; O'Donnell v. Providence, etc., Co., 6 R.I. 211. In the case of Terre Haute, etc., Co. v. Williams, 69 Ill. App. 393, affirmed 172 Ill. 379, 50 N.E. 116, 64 Am. St. Rep. 44, the court said:

'Whenever a duty arises, whether upon common law or statutory grounds, an action will lie for a breach thereof in favor of any one injured by reason of such breach.' ''

''To the same effect is Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543, 12 Am. St. Rep. 698. In the case of Gray v. McDonald, 104 Mo. 303, 16 S.W. 398, it was held that:

'The right of action for an injury done in the commission of a felony or misdemeanor is not merged in the public offense.' ''

''In the case of Baxter v. Coughlin, 70 Minn. 1, 72 N.W. 797, it was held that:

'A director of a bank receiving deposits while insolvent was liable to the depositor suffering loss, notwithstanding the penalty provided in the statute.' "

The decision of the Supreme Court of Missouri in the foregoing respect was adverted to by the Supreme Court of the United States in its decision in:

Prudential Insurance Co. v. Cheek, 259 U.S. 530, 533, 42 S.Ct. 516, 66 L.Ed. 1044, 1049.

We also direct the court's attention to the following decision:

Lockheed Aircraft Corporation v. Superior Court in and for Los Angeles County, 153 Pac.2d 966.

In that case, a District Court of Appeals of California (hearing denied February 1st, 1945, by the Supreme Court of California) held that an employee suffering injury caused by the employer violating a penal statute which prevented the employer from making and enforcing rules prohibiting the employee from engaging in politics or controlling their political activities, has a civil remedy for damages against the employer for violating the statute. A companion statute provided that nothing in the chapter of which the criminal statute was a part prevented the injured employee from recovering damages from his employer for a violation of the criminal statute. The District Court of Appeal indicated by the decision that an action for damages would lie in the absence of a statute expressly conferring that remedy. 153 Pac.2d 972.

We have heretofore shown by decisions of the Supreme Court of the United States, and other courts, that violation of a criminal statute resulting in an injury to property rights supports a cause of action by the person injured for damages, although the statute does not expressly confer that remedy.

See, also:

In re Debs, 158 U.S. 594, 15 S.Ct. 900, 910, 39 L.Ed. 1106;

1 *C.J.*, pp. 952, 954, 957;

1 *C.J.S.*, pp. 994, 996;

1 *Amer. Jur.*, p. 432.

(e) The complaint is sufficient to state a claim against defendant upon which relief can be granted for tortious conduct so as to justify the claim and award of exemplary damages in addition to actual damages.

(All Specification of Errors.)

Since the complaint states a claim upon which relief can be granted, plaintiff is entitled to recover compensation for the injuries he has sustained. This is an axiomatic rule of law not admissible of dispute.

15 *Am. Jur.*, p. 442.

Furthermore, under the facts, as disclosed by the complaint, plaintiff is entitled to recover exemplary damages from defendant.

Philadelphia W. & B. R. Co. v. Quigley, 21 How. 202, 213, 214, 16 L.Ed. 73;

Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181;

Lake Shore & M. S. Ry. Co. v. Prentice, 147 U.S. 101, 107, 13 S.Ct. 261, 37 L.Ed. 97;

U. S. v. Hess, 317 U.S. 537, 549, 63 Sup. Ct. 379, 87 L.Ed. 443.

See:

Green v. Keithley, 8 Cir., 86 Fed.2d 238.

The case last cited comprehensively reviews the authorities from the Federal courts on the question.

Day v. Woodworth, supra, is the leading case on the question in the Federal courts. That was an action for damages for trespass, and holds that exemplary damages are allowable in that type of cases. The Supreme Court extended the rule to all actions for torts and said:

> "It is a well established principle of the common law, that in actions of trespass *and all actions on the case for torts,* a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct *or lawless acts,* by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the

degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory." (Italics supplied.)

There is no statute in Arizona treating with exemplary damages in tort actions and accordingly the allowance of exemplary damages in the Federal courts is a matter of general law which Federal courts determine for themselves.

Green v. Keithley, supra.

In *Philadelphia W. & B. R. Co. v. Quigley, supra,* the Supreme Court again reaffirmed the allowance of exemplary damages in tort cases. Although the Supreme Court held that exemplary damages could not be recovered in that particular case, nevertheless the court said (21 How. 213, 214):

"In Day v. Woodworth, 13 How. S.C.R., 371, this court recognized the power of a jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, *or of criminal indifference to civil obligations.* * * *" (Emphasis supplied.)

Here we have a reckless disregard by defendant of the contractual rights of plaintiff and also the inex-

cusable violation by defendant of a penal statute. Besides, the complaint alleges that the defendant and the brotherhood entered into a conspiracy to deprive plaintiff of the opportunity to become a candidate for public office. (R. 9, 10).

The complaint, in all its aspects, discloses that plaintiff is legally justified in claiming exemplary damages, measured by the decisions cited above, and by the decisions of the Supreme Court of Arizona.

See:

Ross v. Clark, 35 Ariz. 60, 274 Pac. 639;

Gila Water Co. v. Gila Land & Cattle Co., 30 Ariz. 569, 249 Pac. 751.

(f) Tested by the new rules governing pleadings, the complainant states a claim upon which relief can be granted.

(All Specification of Errors.)

The judgment of the District Court, unless reversed, disposes of the case. This summary disposition of the case should not stand unless the complaint in every respect is legally insufficient to state a claim upon which relief can be granted. There are definite, well-settled rules of pleading which now measure the sufficiency of the complaint. They are stated in:

Carroll v. Morrison Hotel Corporation, 7 Cir., 149 Fed.2d 404, 406:

"On a motion to dismiss on the ground that the complaint does not state a claim on which relief can be granted, the rule is that *the complaint must be viewed in the light most favorable to plaintiff* and the truth of all facts well pleaded, admitted, Galbreath v. Metropolitan Trust Co., 10 Cir., 134

F.2d 569. This includes facts alleged on information and belief. There is no specific provision covering such allegations in the Federal Rules of Civil Procedure, but Rule 8(f) states that 'All pleadings shall be so construed as to do substantial justice'; consequently to refuse to give credence to them on defendant's motion to dismiss would be opposed to the spirit of the Rules. Furthermore, Rule 11 provides that the signature of an attorney to the pleadings is a certificate that 'to the best of his knowledge, information, and belief,' there appears to be good ground to support the pleading; so the concept of 'information and belief' is recognized under the Rules, and there appears to be no good reason why such pleading is not permissible, as in the instant case, where the matters are peculiarly within the knowledge of the defendants.

"It has also been held that the complaint should not be dismissed unless it appears certain that plaintiff is not entitled to relief under any state of facts which could be proved in support thereof, Leimer v. State Mut. Life Assur. Co., 8 Cir., 108 F.2d 302, and Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F.2d 865. No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it, Continental Collieries v. Shober, 3 Cir., 130 F.2d 631, 635." (Emphasis ours.)

In *Dioguardi v. Durning, etc.,* 2 Cir., 139 Fed.2d 774, 775, the Court, in passing on the sufficiency of a complaint ("obviously home-drawn") to withstand a motion to dismiss, said:

"* * * Under the new rules of civil procedure, there is no pleading requirement of stating 'facts

sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Federal Rules of Civil Procedure, Rule 8(a), 28 U.S.C.A. following Section 723c; and the motion for dismissal under Rule 12(b) is for failure to state 'a claim upon which relief can be granted.' The District Court does not state why it concluded that the complaints showed no claim upon which relief could be granted; * * *"

See, also:

Burley, et al. v. Elgin J. & E. Ry., 7 Cir., 140 Fed. 2d 488, 490;

Kohler et al. v. Jacobs et al., 5 Cir., 138 Fed.2d 440, 443;

Hannah v. Gulf Power Co., 5 Cir., 128 Fed.2d 930, 931;

Plunkett v. Abraham Brothers Packing Co., Inc., 6 Cir., 129 Fed.2d 419, 421;

Bell v. Preferred Life Assur. Soc. of Montgomery, Ala. et al., 320 U.S. 238, 64 S.Ct. 5;

De Loach et al. v. Crowley's Inc., 5 Cir., 128 Fed. 2d 378, 380;

Rule 54(c), *Federal Rules of Civil Procedure.*

The books are replete with decisions upholding claims for relief when tested by Rule 8 of the Federal Rules of Civil Procedure. If it is held by this Honorable Court that the complaint in the case at bar fails to state a claim upon which relief can be granted, the holding will necessarily have to be based on the merits of the claim and not on the form in which the claim is pleaded. (*Con-*

tinental Collieries v. Shober, 3 Cir., 130 Fed.2d 631, 635).

It is our firm conviction that if the Federal Rules of Civil Procedure were not now in effect, that under the old practice the motion to dismiss (demurrer) should not have been sustained.

Polk v. Glover, 305 U.S. 5, 59 S.Ct. 15;

Borden's Farm Products v. Baldwin, etc., 293 U.S. 294, 55 S.Ct. 187;

Picking et al. v. Pennsylvania R. Co. et al., 3 Cir., 151 Fed.2d 240, 244.

CONCLUSION

We think the complaint states a claim against defendant upon which relief can be granted and that the judgment of the trial court sustaining defendant's motion to dismiss the complaint, and dismissing the action, is erroneous.

It is prayed, therefore, that the judgment of the District Court be reversed.

Respectfully submitted,

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